No. 81-2190

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In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES EMORY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the decision below, sustaining the imposition of liability against him pursuant to Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C.), as a person responsible for seeing that taxes withheld from the wages of corporate employees were paid over to the government, and holding that the government was under no obligation to protect him from personal liability by litigating the validity of its claim relating to the withheld taxes against the corporation in corporate bankruptcy proceedings.

The pertinent facts may be summarized as follows: During the relevant period, James Emory Hall Contractors, Inc., was engaged in the business of logging and road construction, and became delinquent in the payment of with-

holding taxes (CR 25 at 1-2).[1] According to his affidavit filed in the district court, in 1968, petitioner, who was the president and a principal shareholder of the corporation, informed the Internal Revenue Service of the delinquencies (CR 25 at 1-2). Early in 1971, the Internal Revenue Service began seizing corporate property to satisfy these liabilities (CR 25 at 3). In May 1971, petitioner met with representatives of the Internal Revenue Service to discuss the unpaid taxes. As a result of the meeting, the corporation agreed to assign to the government a part of the proceeds of certain logging contracts, and petitioner agreed to guarantee personally the payment of the taxes, in exchange for the government's agreement to release its levies and forbear collecting the taxes (CR 25 at 3-4; CR 25, Exh. 1; CR 17, Exh. J).

Shortly thereafter, on May 11, 1971, the corporation filed a petition for reorganization pursuant to Chapter X of the Bankruptcy Act (CR 1 at 2; CR 25 at 4). In September 1971, petitioner agreed to modify the earlier agreement (CR 25 at 4-5). In relevant part, the modified agreement provided that petitioner would use his best efforts to see that the corporation paid its tax liabilities and petitioner unconditionally promised to pay the remaining corporate liabilities within 18 months after the termination of reorganization or liquidation proceedings (CR 25, Exh. 5; CR 17, Exh. B). On December 30, 1971, the corporate reorganization proceedings were converted to a liquidating bankruptcy (CR 1 at 2). On May 15, 1972, the bankruptcy court sustained the contention of competing creditors that the government was not entitled to payment of its tax claim as a secured creditor, because notice of its tax liens had been filed in the wrong

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[1] "CR" refers to the docket control numbers assigned to the documents in the original record by the Clerk of the District Court, followed, where necessary, by the appropriate page references.

place (CR 25, Exh. 7). The corporate assets were liquidated and the proceeds were distributed to creditors (CR 18 at 1). The liabilities involved here remained unpaid (CR 18 at 2)[2]

In the trial court, petitioner admitted that he was responsible under Section 6672 for seeing that the withholding taxes were paid. Nevertheless, he sought to avoid the entry of judgment against him on various theories that the government had breached a duty to him to pursue the assets of the corporation.[3] The district court granted summary judgment in favor of the government, and the court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that the government is not precluded from collecting liabilities assessed pursuant to Section 6672 against a responsible person, when the taxes can no longer be collected directly from the corporation. The courts of appeals have uniformly rejected the argument that the government is under an obligation to protect a responsible person from his Section 6672 liability. *Teel* v. *United States*, 529 F. 2d 903 (9th Cir. 1976) (the government is under no duty to exercise priority in a corporate receivership proceeding, rather than collect trust fund taxes from the responsible person); *Bernardi* v. *United States*, 74-1 U.S. Tax Cas. para. 9170 (N.D. Ill. 1973), opinion adopted, 507 F. 2d 682 (7th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (the government is not required to pursue

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[2]On April 21, 1972, the Internal Revenue Service made an assessment of $518,465.56 against petitioner (CR 1 at 5).

[3]Petitioner argued, *inter alia*, that the government was precluded from obtaining judgment against him because it had not appealed the adverse ruling of the bankruptcy court concerning the government's priority in the corporate bankruptcy proceedings, that the government was not entitled to judgment against him because it did not comply with the agreements it entered with him which, in his view, required it to file notices of tax liens in the correct jurisdiction, and that the District Director lacked authority to enter the agreements with petitioner.

its rights in corporate bankruptcy proceedings as a condition to collecting Section 6672 liabilities); *Datlof* v. *United States*, 370 F. 2d 655 (3d Cir. 1966) (the government is under no duty to assert its rights in a foreclosure proceeding against corporate assets, but may seek instead to collect from the person responsible for seeing that the taxes were paid); *Cash* v. *Campbell*, 346 F. 2d 670 (5th Cir. 1965) (the government is not required to look to corporate funds in an interpleader action for payment, rather than the responsible person); see also *Monday* v. *United States*, 421 F. 2d 1210 (7th Cir.), cert. denied, 400 U.S. 821 (1970); *Hornsby* v. *Internal Revenue Service*, 588 F. 2d 952 (5th Cir. 1979).[4]

Contrary to petitioner's argument (Pet. 5), the decision below does not conflict with *Holcomb* v. *United States*, 543 F. 2d 1185 (7th Cir. 1976). That case does not hold that the government is under a duty to protect a responsible person from liability, or to forgo collection of the taxes from him. Instead, the court in *Holcomb* held that summary judgment against the responsible persons was inappropriate because there were material questions of fact regarding, *inter alia*, whether the government had agreed to apply sums received from the corporation first to the trust fund portion of its unpaid liabilities, which would have had the effect of reducing the amount of the assessment against the responsible persons. The Seventh Circuit's subsequent

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[4]The case law is consistent with the published policy of the Internal Revenue Service to use Section 6672 to collect the revenue from the responsible person only if the taxes cannot be collected directly from the corporation. Thus, an assessment will not be made against a responsible person at a time when there are corporate assets which may be seized and applied to its unpaid tax liabilities. The Service will abate an assessment against the corporation *pro tanto*, when the corporation is involved in court proceedings and the responsible person has made payments to satisfy his Section 6672 liability. Policy Statement P-5-60 (Handbook, Policies of the Internal Revenue Service, IRM 1218 (1 Administration, Int. Rev. Man. (CCH) para. P-5-60, at 1305-15 (1977))).

opinion, after a decision on remand, makes it clear that its view is in accord with the decision in this case. In that subsequent opinion, the court stated that absent some express agreement to do so, the government was under no obligation to protect the responsible person from his liability by applying sums it received from the corporation to the trust fund portion of its tax liability. *Holcomb* v. *United States*, 622 F. 2d 937, 942 (1980).

2. Petitioner further asserts (Pet. 4-5) that the decision below deprived him of his right to due process secured by the Fifth Amendment by denying him a forum in which to present his claims. But petitioner was afforded a forum in which to present his various contentions that the government breached some duty owed to him. His arguments, however, were rejected as defenses to liability, as a matter of law.[5] In these circumstances, summary judgment was entirely appropriate and deprived petitioner of nothing to which he was entitled.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

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[5]For example, petitioner urged below that by failing to file notices of its tax liens in the proper jurisdiction to protect its claim against competing corporate creditors, the government breached the written agreements it entered with petitioner. But the agreements, which were submitted to the trial court, contained no promise by the government to file notices of its liens and, thus, provided no factual support for petitioner's position.

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